Federal Court  Cour fédérale

Date: 20220608

Docket: IMM-4746-21

Citation: 2022 FC 853

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 8, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

et

WILFRED BEAUREL KOUOKAM LOWE

Respondent

JUDGMENT AND REASONS

[1] Wilfred Beaurel Kouokam Lowe (the Respondent) received a favourable decision from the Immigration Appeal Division (IAD) with respect to the loss of his permanent residence in Canada because he had not met the physical presence requirement in Canada.

[2] The Respondent already holds Cameroonian citizenship, by birth, and French citizenship since 2017. The Minister of Citizenship and Immigration is seeking judicial review of the IAD's decision because it believes the decision to be unreasonable. The application for judicial review is made under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act].

I. The facts

[3] An overview of the facts will provide the general context. The Respondent is a citizen of Cameroon. He is married and has a family. His wife and their two children are French citizens and live in France. He is a biostatistician. She is a pharmacist.

[4] On May 17, 2016, the Respondent obtained permanent residence in Canada. In 2013 and 2014, he made trips to Canada, where he stayed and worked eight and six months. Four days after obtaining permanent residence in May 2016, he left Canada for France. He returned only on November 9, 2016, for a few days, to look for a job in his field of expertise. He quickly returned to France, where he obtained French citizenship, as previously stated. From 2016 to 2020, the Respondent worked there for two companies working in medical research.

[5] In October 2020, the Respondent arrived in Canada to settle permanently, having found a job in his field. He returned to France in December 2020, where he stayed for 13 days before returning to Canada on January 3, 2021. An officer of the Canada Border Services Agency interviewed him and wrote a report under subsection 44(1) of the IRPA because of his failure to comply with his residency obligation.

[6] The Minister's representative then issued a departure order against him. On January 19, 2021, the Respondent appealed this removal order to the IAD. He conceded that he had failed to comply with his residency obligation but argued that there are humanitarian and compassionate grounds for the IAD to exercise its discretion and allow his appeal.

[7] On February 12, 2021, the Respondent returned to France because his new employer allowed him to work remotely.

II. The impugned decision

[8] The IAD concluded that the departure order is well founded in law in that there is insufficient physical presence in Canada, but that there are sufficient humanitarian and compassionate grounds to warrant special measures.

[9] The IAD analyzed the extent of the residency obligation violation. It estimated that the Respondent is approximately 512 days (or 70%) short of the residency obligation, which is two years (730 days) in a five-year period. The humanitarian and compassionate grounds invoked by the Respondent must therefore be significant in order to proportionately counterbalance the breach of the residency obligation.

[10] The five-year period for the Respondent is from May 17, 2016, to May 17, 2021. At the time of his return to Canada and examination on January 3, 2021, there were 134 days remaining in this period. The IAD referred to the visa officer's calculation that the Respondent spent 84 days in Canada prior to examination. The visa officer added the 134 days that the Respondent

could have spent in Canada until the end of the five-year period, for a total of 218 days. The arithmetic is simple: 730 days of physical presence in Canada are required to meet the legal obligation; 84 days were spent in Canada, and the Applicant is credited with 134 days had he remained in the country until May 17, 2021. This total of 218 days is well short of the 730 days required.

[11] In fact, it appears that the Respondent was credited with more time than he was entitled to. In fact, the period spent in Canada during the last 134 days is less than this total since he returned to France.

[12] The Respondent argued before the IAD that the 77 days of presence corresponding to the period during which he began working outside the country for Dalhousie University, his new Canadian employer, should be counted under the exception provided for in subparagraph 28(2)(a)(iii) of the IRPA. He stated that his employer had allowed him to work remotely due to the pandemic. This period is from March 1 to May 17, 2021. The IAD rejected this argument, noting that days following the issuance of a negative report by a visa officer cannot be taken into account under paragraph 62(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. The IAD added that these days were credited as potential days that the Respondent could have accumulated in Canada until the end of the five-year period.

[13] The IAD was of the view that the professional reasons given by the Respondent do not justify his departure from Canada. Stays of a few days are clearly insufficient to secure

employment, especially in a specialized field. Furthermore, the Respondent has not provided any evidence to show that he attempted to find employment in Canada between 2016 and 2018. He began his job search in 2019 and limited it to his area of expertise. The IAD found that the Respondent would have benefited from broadening the scope of his search, especially given that he worked in France in medical research. The IAD found that the departure from Canada was a personal decision by the Respondent rather than a result of circumstances beyond his control.

[14] The IAD then examined whether the Respondent attempted to return to Canada at the first opportunity. The Respondent alleged that he returned to Canada in 2020 after successfully finding employment in his field. He then left that job after finding another job more related to his expertise. The Respondent therefore returned to Canada at the earliest opportunity; this is a positive factor.

[15] The IAD found the Respondent's overall establishment to be a neutral factor. The Respondent stayed in Canada for only a few days after obtaining permanent residence in May 2016, before returning briefly in November 2016. The IAD found that the Respondent had not convincingly demonstrated that he had made sufficient efforts to integrate during these short periods. Previous stays in Canada in 2013 and 2014 to work for six and eight months may nonetheless compensate, the IAD says, for part of the Respondent's lack of initial establishment upon obtaining permanent residence, even if it remains low.

[16] The Respondent began working in Canada as of October 2020. Since March 1, 2021, his new work has included work on a COVID-19 vaccine. Thus, the Respondent would have worked

approximately six months in Canada during the five-year period. He rented an apartment and applied for a mortgage to purchase a home. The period of integration is relatively short, and the integration efforts late but “meaningful and significant in terms of progress for Canadian society during the pandemic” (IAD decision at para 30). The IAD considered the objectives of subsection 3(1) of IRPA in its analysis and found that the Respondent’s professional contribution is part of the social and economic benefits. The IAD placed a positive value on the integration and establishment of the Respondent during the five-year period.

[17] The IAD found that the Respondent has family ties in Canada. He has an aunt who took him in during one of his visits.

[18] The IAD then turned to the dislocation that will be experienced by the Respondent and his family if he is unable to establish himself in Canada. The IAD found that a rejection would have consequences that weigh in favour of special relief. The Respondent argued that he experienced racism in France and wants his children to be free from it. The IAD noted that the Respondent testified credibly at the hearing; however, the IAD found that the Respondent did not demonstrate what steps were taken to address these incidents, or how he was further affected by the discrimination. The IAD recognized the discomfort associated with racism but could not give it determinative weight.

[19] The Respondent added that it was his permanent resident status that enabled him to obtain his current employment. He does not have a work permit and the loss of his status could therefore result in a loss of employment. This would have an impact on his application to

sponsor his family, as well as on his financing efforts. The IAD also recognized that the Respondent has a very specialized field of expertise and that the job search process is complex. In addition, the loss of his job would diminish his ability to provide for his family.

[20] The interests of the Respondent's children did not weigh in favour of special relief, particularly as his children live in France and have no status in Canada. The Respondent's current employer has allowed him to work remotely because of the pandemic, and the eventual dismissal of the appeal would not result in any change for them.

[21] Finally, the IAD considered that the fact Canada is experiencing a pandemic and that the Respondent has professional expertise in research and vaccination are special circumstances that warrant special relief.

III. Relevant provisions

[22] Section 28 of the Act describes the residency obligation of a permanent resident:

Residency obligation	**Obligation de résidence**
28 (1) A permanent resident must comply with a residency obligation with respect to every five-year period.	**28 (1)** L'obligation de résidence est applicable à chaque période quinquennale.
Application	**Application**
(2) The following provisions govern the residency obligation under subsection (1):	**(2)** Les dispositions suivantes régissent l'obligation de résidence:
a) a permanent resident complies with the residency	(a) le résident permanent se conforme à l'obligation dès

obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are	lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas :
(i) physically present in Canada,	(i) il est effectivement présent au Canada,
. . .	. . .
(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,	(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,
. . .	. . .
b) it is sufficient for a permanent resident to demonstrate at examination	(b) il suffit au résident permanent de prouver, lors du contrôle, qu'il se conformera à l'obligation pour la période quinquennale suivant l'acquisition de son statut, s'il est résident permanent depuis moins de cinq ans, et, dans le cas contraire, qu'il s'y est conformé pour la période quinquennale précédant le contrôle;
(i) if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a permanent resident;	
. . .	. . .
[Emphasis added.]	[Je souligne.]

[23] Section 62 of the IRPR refers to the calculation of days for the residency obligation:

Calculation – residency obligation	**Calcul : obligation de résidence**
62 (1) Subject to subsection (2), the calculation of days under paragraph 28(2)(a) of the Act in respect of a	**62 (1)** Sous réserve du paragraphe (2), le calcul des jours aux termes de l'alinéa

permanent resident does not include any day after	28(2)a) de la Loi ne peut tenir compte des jours qui suivent :
a) a report is prepared under subsection 44(1) of the Act on the ground that the permanent resident has failed to comply with the residency obligation; or	(a) soit le rapport établi par l'agent en vertu du paragraphe 44(1) de la Loi pour le motif que le résident permanent ne s'est pas conformé à l'obligation de résidence;
b) a decision is made outside of Canada that the permanent resident has failed to comply with the residency obligation.	(b) soit le constat hors du Canada du manquement à l'obligation de résidence.
Exception	**Exception**
(2) If the permanent resident is subsequently determined to have complied with the residency obligation, subsection (1) does not apply.	**(2)** S'il est confirmé subséquemment que le résident permanent s'est conformé à l'obligation de résidence, le paragraphe (1) ne s'applique pas.

IV. Standard of review and parties' arguments

[24] The parties agree that the standard of review is reasonableness, as recognized by *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] in cases involving an IAD decision on the consideration of humanitarian and compassionate grounds (see, among others, *Eftekharzadeh v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 1000 at para 23; *Yu v Canada (Citizenship and Immigration)*, 2020 FC 1028 at para 8).

[25] It follows, of course, that the reviewing court must adopt an attitude of respect for the decision under review and show judicial restraint. The burden will be on the person challenging the administrative decision. The reviewing court is required to understand the reasoning of the

decision maker and must consider “whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99). Only serious shortcomings that meet the requirements of justification, transparency and intelligibility can be considered. The shortcoming must be “sufficiently central or significant to render the decision unreasonable” (*Vavilov* at para 100).

A. *Applicant’s arguments*

[26] The Attorney General recognizes, of course, that the IAD has the authority to weigh each of the relevant factors. However, the residency obligation for those who wish to maintain their permanent Canadian residence is significant. To suggest that the field of work in which a permanent resident works could be a humanitarian and compassionate factor to counterbalance the failure to comply with the obligation to be physically in Canada for 730 days in a five-year period is unreasonable.

[27] The Applicant criticizes the IAD’s analysis of the extent of the breach of the residency obligation. In its decision, the IAD adopted the calculation made by the officer (who had made the section 44 report) of the 218 potential days to conclude that there was a shortfall of 512 days (70%). However, the Applicant notes that the Respondent left Canada for France on February 12, 2021. Because the Respondent returned to France, the calculation is therefore incorrect — only 40 additional days should be taken into account, not 134 days. The Respondent spent 125 days in Canada, and his breach of the residency obligation amounts to 605 days (82%). This is an error in a crucial element of the analysis. In effect, the officer made a *potential calculation* to the end

of the five-year period. This is understandable because it established that the Respondent could not meet the 730 day target even if he resided in Canada during the period from January 3, 2021, to May 17, 2021. The report under subsection 44(1) of the IRPA clearly states that this is an [TRANSLATION] "opportunity to obtain a total of 218 days on Canadian soil", should the Respondent remain in Canada until the end of the five-year period (Certified Tribunal Record (CTR) at page 18). In effect, the Respondent was not in Canada during this 77-day period, so the IAD should not have taken this into account.

[28] Moreover, the IAD explained that it did not consider the Respondent's argument that these 77 days of attendance should be taken into account, since the IRPA prohibits taking into account days following the issuance of a negative report. It nonetheless included this period in its calculation, credited as potential days that the Respondent could have accrued. The IAD misinterpreted the calculation to be made. It had to consider the actual establishment and rely on the Respondent's presence at the *time of the appeal*, not the hypothetical calculation made by the visa officer (*Canada (Public Safety and Emergency Preparedness) v Abderrazak*, 2018 FC 602 [*Abderrazak*] at para 17).

[29] The shortfall, even at 70% of the five-year period, was a serious breach of this physical presence obligation. Therefore, substantial humanitarian grounds were required to overcome the seriousness of the breach (*Ouedraogo v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 310 [*Ouedraogo*] at para 27). The Applicant argues that the severity of the breach was underestimated by the IAD, which affected the overall analysis of the humanitarian and compassionate factors. The shortfall was even greater than calculated; therefore, the

humanitarian and compassionate grounds had to be proportionate to the actual severity of the breach (*Abderrazak*; *Canada (Citizenship and Immigration) v Hassan*, 2017 FC 413 [*Hassan 2017*]).

[30] The Applicant alleges that the IAD's analysis of the reasons for leaving Canada and remaining abroad is flawed. The Respondent has provided no evidence to prove his job search efforts. Nevertheless, he worked in France between 2016 and 2020. The Respondent *chose* to be employed and continue his activities in France rather than settle and find employment in Canada. This choice resulted in the breach of his residency obligation. The Applicant points out that maintaining employment outside of Canada is contrary to the objectives of IRPA — this principle should apply to permanent residents regardless of the nature of their employment outside of Canada (*Abderrazak* at para 24).

[31] The Applicant argues that the IAD mischaracterized the Respondent's attempt to return to Canada at the first opportunity. The Respondent's departure from Canada a few days after failing to find employment in his chosen field and four days after obtaining permanent residence, and his prolonged stay abroad constitute a significant breach; to find that he returned to Canada at the first opportunity *after finding employment* and to attribute positive value to that is an error in principle. The evidence clearly establishes that the Respondent was established and working in France. Moreover, the IAD also considered the additional factor of having returned to Canada after finding employment. The Respondent only returned after finding employment in his field.

[32] The Applicant also criticizes the IAD's conclusion regarding the Respondent's overall establishment. The IAD first explained that the Respondent did not make sufficient efforts to integrate during the brief periods of stay after his initial establishment, and that such efforts were late and short. Yet it concluded that these efforts were significant in terms of progress for Canadian society. This conclusion is difficult to understand in light of the evidence on file.

[33] The Applicant adds that the IAD gave positive weight to the integration of the Respondent solely on the basis of his pandemic work, even though the Respondent had only been working for two months in his new job in Canada. He believes that the IAD erred in giving overriding weight to this factor. The IAD referred to the general objectives of the IRPA at the expense of the residency obligations under section 28 of IRPA. It has thus set aside this obligation, which provides for "direct consequences for the violation of section 28 requirements that cannot be remedied easily and without thorough balancing of the proper factors" (*Canada (Public Safety and Emergency Preparedness) v Abu Antoun*, 2018 FC 540 at para 29). The IAD conducted a selective analysis of the evidence and did not give proper weight to the relevant factors.

[34] The IAD considered it favourable that the Respondent worked for approximately six months in Canada and that he had rented an apartment. The lease provided in evidence, however, is incomprehensible as it runs from 06-10-20 to 06-10-20 (CTR at pages 59–61). The Applicant also criticizes the fact that the IAD referred to the steps taken to obtain a mortgage for the Respondent. He points out that this is a potential for establishment in Canada in the assessment of humanitarian and compassionate considerations, which is contrary to the case law

(*Shaheen v Canada (Citizenship and Immigration)*, 2019 FC 1328 [*Shaheen*] at para 31; *Nassif v Canada (Citizenship and Immigration)*, 2018 FC 873 at para 33; *Hassan 2017* at para 24).

[35] The IAD found the family ties to Canada, which were limited to an aunt who allegedly housed the Respondent during his short periods in Canada, to be a favourable factor, but it did not explain how it reached this conclusion or cite any evidence showing how this factor was significant.

[36] Further, the IAD's findings as to the dislocation that would be caused to the Respondent if he cannot establish himself in Canada are [TRANSLATION] "speculative". The evidence on record does not establish that permanent resident status is required for the Respondent's employment. The IAD added that the Respondent would risk losing a means of supporting his family while he worked in France between 2016 and 2020 and his wife is still a pharmacist and owner of her business there. A decision is unreasonable if it is not supported by any real evidence, or if there are contradictory statements or inconsistent findings (*Hassan 2017* at para 24). The Respondent, not the IAD, had the burden of showing the consequences of a refusal.

[37] Finally, the Applicant reiterates that the IAD minimized the residency obligation by focusing on the particular circumstances of the Respondent and accepting that a permanent resident need only have work that is deemed "important" within the meaning of the IAD in order to maintain status, even though the Respondent has only been working in that field for two months. The IAD must limit itself to examining the circumstances of a case, but it chose to give inordinate weight to the Respondent's field of work, to the exclusion of all other relevant factors

against him. The IAD should not selectively assess the evidence in favour of the Respondent (*Canada (Citizenship and Immigration) v Tefera*, 2017 FC 204 at paras 50–51).

B. *Respondent's arguments*

[38] The Respondent submits that the IAD followed the established jurisprudential criteria. He points out that the jurisprudential criteria are not exhaustive, and that other factors may be considered in determining whether special relief should be granted.

[39] The Applicant argues that the potential calculation made by the officer should not have been taken into account. However, the Respondent argues that the IAD did take into account his extended absence, and that is what matters. It is therefore disputed that the use of this calculation would have changed the analysis of the other criteria.

[40] The Respondent believes that he attempted to return to Canada at the first opportunity. He argues that he wanted to be financially independent before moving to Canada. He worked for a Belgian company with offices in Canada while he was in France and requested a transfer. He also made several attempts to find a job.

[41] The Applicant has misrepresented the IAD's analysis of overall establishment. A neutral value was assigned. The IAD considered the objectives of the IRPA in analyzing his integration efforts and his participation in the collective effort in the context of a health crisis. In addition, the Respondent states that the housing lease indicates a term of October 11, 2020, through June 30, 2021, contrary to what the Applicant states.

[42] The Respondent explains that the IAD did not say that family ties to Canada were significant, but only gave them a positive value because of their existence.

[43] Finally, each case must be considered on its own merits, and the relevant factors and the weight to be given to them may vary (*Shaheen* at para 29). The IAD has independently and carefully analyzed the various factors in the record. The Applicant, however, is on a "line-by-line treasure hunt" (*Vavilov* at para 102) and has not demonstrated how the decision is unreasonable.

V. Analysis

[44] The breach of the residency obligation for the permanent resident is very significant: it is not a matter of virtual presence but rather of actually being in Canada, which is captured in English by the requirement to be "physically present in Canada" (paragraph 28(2)(a) of the Act). On the record before the Court, physical presence was the only way to comply with the section 28 requirement in this case. Failure to comply with the residency obligation is met by section 41 of the Act:

Non-compliance with Act	**Manquement à la loi**
41 A person is inadmissible for failing to comply with this Act (a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and (b) in the case of a permanent resident, through failing to	**41** S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposes.

comply with subsection 27(2) or section 28.

[Emphasis added.]

As can be seen, the breach is punished by inadmissibility.

[45] The severity of the Act is mitigated in that there is an appeal from the removal order that results from an inadmissibility. Two sections apply to obtain this mitigation. Subsection 63(3) of the Act allows for such an appeal to the IAD:

Right to appeal removal order	**Droit d'appel : mesure de renvoi**
63 (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.	**63 (3)** Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise en vertu du paragraphe 44(2) ou prise à l'enquête.

The basis for an appeal is set out in subsection 67(1) of the Act. The subsection reads as follows:

Appeal allowed	**Fondement de l'appel**
67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67 (1)** Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
a) the decision appealed is wrong in law or fact or mixed law and fact;	(a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

b) a principle of natural justice has not been observed; or,	(b) il y a eu manquement à un principe de justice naturelle;
c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	(c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[Emphasis added.]

[46] In my view, while the reviewing court should exercise judicial restraint and adopt an attitude of respect for the IAD's decision, this is a clear case where the decision under review cannot be characterized as reasonable. It is neither justified, transparent nor intelligible in light of the factual and legal constraints.

[47] The appeal to the IAD was granted primarily on humanitarian and compassionate grounds. The IAD considered the following standard criteria in this area:

- The extent of the breach of the residency obligation;
- The reasons for leaving Canada;
- The reasons for the continuous or prolonged stay abroad;
- Whether the appellant attempted to return to Canada at the first opportunity;
- The degree of initial and subsequent establishment;
- Family ties to Canada and the fact that they may sponsor the appellant;

- The dislocation caused to the appellant and his family members in Canada if he cannot return to Canada;
- The best interests of the children directly affected;
- The existence of special circumstances that merit special relief.

[48] The Supreme Court of Canada in *Vavilov* prescribed that "[a] reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable" (at para 99). This is indeed what the Court did in reaching its conclusion that the decision as a whole is not reasonable. I will take up the criteria put forward one by one.

A. *Extent of the Respondent's breach of the residency obligation*

[49] The notes to the Global Case Management System indicate that the Respondent was in Canada from May 17 to May 21, 2016, and from November 9 to November 12, 2016 (CTR at page 31). They state that the length of stay for the month of November 2016 is seven days, when in fact it was four days. It thus appears that the length of the Respondent's physical presence in Canada is even less than the days credited to him on January 3, 2021, upon his return to Canada after a 73-day return in 2020 and his departure for France for the end-of-year vacation. The timetable for physical presence in Canada after obtaining Canadian permanent residence therefore looks like this:

- May 17, 2016, to May 21, 2016: 4 days
- November 9, 2016, to November 12, 2016: 4 days (not 7 as stated)
- October 11, 2020, to December 22, 2020: 72 days

He was therefore present for 80 days, not 84 days. Nevertheless, this is a marginal difference at best. What seems to me more significant is that the Respondent obtained French citizenship in 2017, while at the same time not being present in 2017, 2018 and 2019 to maintain permanent residence in Canada.

[50] I note that paragraph 62(1)(a) of the IRPR provides that the days following a report made by an officer under subsection 44(1) of the IRPA for failure to comply with the residency obligation shall not be counted in the calculation under paragraph 28(2)(a) of the IRPA. The report in question is dated January 3, 2021, and establishes that the Respondent has failed to comply with this obligation (CTR at pages 18–19). The exception provided for in subsection 62(2) of the IRPA does not apply here, as the IAD has confirmed that the Respondent failed to comply with his obligation of physical presence (IAD decision at para 15). It is therefore doubtful that it is even appropriate to consider the 40 days between January 3, 2021, and February 12, 2021, the date of the Respondent's departure for France, where he says he was allowed to work for his new Canadian employer. It is even more doubtful that the period from January 3 to May 17, 2021, which the officer had considered as a potential period during which the Respondent could have continued to accumulate additional days of permanent residence in Canada, should be considered.

[51] The IAD specifically states that the IRPR do not allow for days following the issuance of a negative report, and that the exception in subparagraph 28(2)(a)(iii) of the IRPA does not apply in this case. Yet it argues that these days were credited as "potential days" (IAD decision at para 14) leading to a shortfall of 70% (512 days short of the required total of 730 days), which

would have required an explanation. Indeed, the figure of 218 days of physical presence in Canada is composed to a good extent of days when the Respondent was not in Canada. It is impossible, having said this with respect, to understand the IAD's chain of reasoning in the calculation; its conclusion is therefore not intelligible (*Vavilov* at para 99).

[52] Even granting the Respondent the more favourable calculation, there is still a shortfall of at least 80% in the days of physical presence to meet the minimum requirements of the Act. Humanitarian and compassionate grounds must be proportionate to the seriousness of the breach of the residency obligation (*Ouedraogo* at para 27; *Patel v Canada (Citizenship and Immigration)*, 2019 FC 394 [*Patel*] at para 12). Whatever the calculation, I believe that this seriousness has been underestimated. The extent of the Respondent's breach of the obligation is greater than that determined by the IAD. Whether the period is 70%, 80% or even more, it is an important factor in determining whether humanitarian and compassionate grounds justify the retention of permanent resident status (*Metallo v. Canada (Citizenship and Immigration)*, 2021 FC 575 at para 27). Put another way, the Respondent spent very little time in Canada despite the legal requirement to be in Canada for two out of five years. However, the obligation to be in the country for 40% of the time for those who obtain permanent resident status in Canada does not appear to be difficult for those who want to contribute to the community that opens its arms to them. The commitment is not there. The deficit in relation to the legal obligation is not marginal. It is considerable. It is therefore necessary to see if the other factors are commensurate with the significant deficit.

B. *Reasons for leaving Canada and staying abroad*

[53] The IAD correctly points out that the Respondent's stints were far too short to find employment in a specialized field, and that there was no evidence that he undertook a job search prior to 2019 (IAD decision at paras 19–20). There was no evidence of any efforts to find employment between 2016 and 2018 (CTR at pages 96–110). The IAD considers this to be more of a personal choice and assigns this factor a negative value (IAD decision at para 21).

[54] The Applicant argues that retaining employment outside of Canada is contrary to the objectives of IRPA, which is further confirmed by case law (*Canada (Citizenship and Immigration) v Miteyo*, 2021 FC 763 at para 25; *Canada (Citizenship and Immigration) v He*, 2018 FC 457). The IAD found this factor to be negative. This adds to an already considerable deficit in days of residence in the country.

C. *Attempt to return to Canada at the first opportunity*

[55] The IAD found that the Respondent returned to Canada at the first opportunity. This cannot be justified. The finding on the previous factor makes it inconsistent to claim that the Respondent attempted to return to Canada at the first opportunity. The Respondent merely spent a few days in Canada to find a job in a highly specialized field and did not submit evidence of job searches until 2019. The Respondent has worked continuously in France and has applied for and received French citizenship, and there is no evidence that he attempted to return before 2020. It is unrealistic to believe that this was the first opportunity, especially since, in France, he has held positions in medical research rather than in his field. In addition, I note that the IAD has in

fact changed the test suddenly, in paragraph 22 of the IAD decision, to “earliest opportunity after finding employment”. I agree with the Applicant that it is illogical and inconsistent to find [TRANSLATION] “a serious breach attracting a negative assessment [for his extended stay abroad, and to find that the Respondent] returned to Canada at the first opportunity” (Applicant’s memorandum at para 58).

[56] I find that the Respondent returned when it was ideal for him to do so, which does not meet the jurisprudential test of requiring a return to Canada at the first opportunity. It is difficult to understand from the IAD’s reasons how the Respondent’s conduct supports a finding that he did return at the earliest opportunity, especially since he accepted positions in a related field in France. The IAD itself states that it “would have been in Mr. Kouokam Lowe’s interest to broaden his search to other types of employment” (IAD decision at para 20).

D. *Respondent’s overall establishment*

[57] The Applicant criticizes the IAD for both finding that the Respondent did not make sufficient efforts to integrate during his brief stays, and then concluding that such efforts were significant in terms of progress for of Canadian society. There is some incongruity in this conclusion, and I am not convinced that the IAD intelligibly explains how it reconciles these facts to place a neutral value on overall establishment, especially when it finds that the Respondent “did not persuasively demonstrate that he made sufficient efforts to ensure his integration [initially]” (IAD decision at para 25), but that two months in his new job is sufficient to establish him during the five year period.

[58] The Applicant adds that the lease is incomprehensible and contains errors as to the rental dates. I disagree. The lease clearly shows a fixed term of just under nine months (CRT at 59). This argument must therefore be rejected. But that is not the real issue. The Applicant correctly criticizes the IAD's reliance on the Respondent's prospective establishment, including pre-approval mortgage steps, to give positive weight to his subsequent establishment (IAD decision at paras 29–30). Indeed, the case law is clear — prospective establishment is not relevant in assessing humanitarian and compassionate grounds (*Canada (Public Safety and Emergency Preparedness) v Hassan*, 2019 FC 1090 [*Hassan 2019*] at para 16; *Canada (Public Safety and Emergency Preparedness) v Lotfi*, 2012 FC 1089 at paras 21–23). It is an error for the IAD to take this element into account in its analysis; it must take into account the establishment corresponding to the period spent in Canada at the time it renders its decision (*Hassan 2019* at para 16).

E. *Family ties to Canada*

[59] The Applicant argues that the IAD should have explained why it gave a positive value to family ties in Canada based solely on the presence in Canada of an aunt. The IAD simply noted the existence of a connection to a Canadian person. If positive value can be given on this basis alone, it should be remembered that this value can only be low. The Applicant does not demonstrate how this aspect of the decision is unreasonable, but the weight in the overall assessment of humanitarian and compassionate considerations can only be minimal.

F. *Dislocation caused to the Respondent and his family if he is unable to establish himself in Canada*

[60] The Applicant argues that the dislocation considered by the IAD are [TRANSLATION] "speculative". The IAD's findings on this point appear to flow from the Respondent's testimony, which it found to be credible (IAD decision at para 35). The issue is to analyze the possible consequences for the Respondent and his family if he cannot establish himself in Canada.

[61] In fact, the Applicant's argument is based on his claim that there is no tangible evidence of the statement made by the Respondent; it is unclear why permanent resident status is a prerequisite to the employment he had. Furthermore, the Applicant points out that the Respondent's wife is a pharmacist in France, and she even owns her own pharmacy.

[62] The dislocation to be discussed concerns an individual who chose not to enjoy the benefits of the permanent residence he had acquired on May 17, 2016. Almost five years later, he lost it; he testifies that this would prevent him from sponsoring his family members settled in France and the IAD states that "the loss of permanent resident status could result in the loss of his employment" (IAD decision at para 37). In my view, the Applicant is not wrong to speak of "speculation". It is rather that the Respondent has tried to create several professional avenues for himself, becoming a citizen in France where his family is established and first obtaining permanent residence in Canada. But it is hard to see how losing permanent residence because a clear obligation under the Act was not met would amount to dislocation. We are in the midst of speculation. The loss of a speculative opportunity is not dislocation. It is at best the loss of a benefit because the person concerned has not met the minimum requirements of the Act.

[63] Neither the IAD nor the Respondent argue that the best interests of the children are in favour of humanitarian and compassionate considerations, which in my view confirms that the alleged dislocation is merely speculative. As the IAD states in paragraph 40:

> [40] Mr. Kouokam Lowe is the father of two minor children, ages 3 and 1. These children were born in France and have no status in Canada. Mr. Kouokam Lowe stated that his children were enrolled in school and daycare. He stated that his current employer allowed him to perform his work remotely from France given the risks associated with the pandemic and to allow him to be with his young children. These special working conditions allow Mr. Kouokam Lowe to be with his children and to look after their well-being, which is in their best interest. The possible dismissal of the appeal would not change the children's family environment, as their father would be physically with them in France. Accordingly, the panel determines that the best interests of Mr. Kouokam Lowe's children do not weigh in favour of allowing the appeal.
>
> [Emphasis added.]

G. *Special circumstances*

[64] Finally, the Applicant argues that the IAD minimized the Respondent's residency obligation because of special circumstances. The IAD explains that the Respondent's expertise in the field of research and vaccination are special circumstances warranting special relief (IAD decision at para 41).

[65] I cannot see how holding a job as a biostatistician could constitute "sufficient humanitarian and compassionate considerations" for special relief. As noted earlier, the Act provides the basis for an appeal (section 67) and speaks of humanitarian and compassionate grounds. But there must be humanitarian and compassionate grounds. It would be a misrepresentation of humanitarian and compassionate grounds to seek to find such

considerations in a particular employment. If the existence of special considerations is to have any meaning, without trying to make it a catch-all, it must be attached to those humanitarian and compassionate considerations. This is the connecting factor to section 67 of the Act that gives rise the appeal. The IAD made it very clear that it was granting the appeal on humanitarian and compassionate grounds. Therefore, the factor must be humanitarian and compassionate in nature. If circumstances such as employment as a biostatistician are invoked as special circumstances, they must be related to humanitarian and compassionate grounds. No such demonstration has been made. I recall that the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, noted that the nature of "humanitarian and compassionate" provisions is part of the same concept:

> [21] But as the legislative history suggests, the successive series of broadly worded "humanitarian and compassionate" provisions in various immigration statutes had a common purpose, namely, to offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Chirwa*, at p. 350.

[66] At the heart of humanitarian and compassionate provisions is the desire to relieve the misfortunes of the person invoking such a ground. The decision under review gives no indication of how holding a job in a particular field might excite a desire to relieve the misfortunes of that person. The employment in question is for the benefit of the community, according to the IAD, which has nothing to do with the misfortunes of the individual sought to be relieved. Perhaps the type of job can be a factor in who wants to immigrate. It could be an asset to the country. But humanitarian and compassionate considerations are not part of a parallel immigration regime (*Kanthasamy* at para 25). The two should not be confused.

VI. Conclusion

[67] My analysis of the various factors considered leads me to conclude that the magnitude of the breach of the residency obligation cannot be offset by the other relevant factors. In fact, several of them are negative. The use of any and all of these factors, or all of them taken together, is not reasonable in the sense that there is no justification, transparency and intelligibility with respect to the factual and legal constraints to justify the decision rendered.

[68] I find that the application for judicial review should be allowed. I agree that it is not the role of the Court to re-evaluate the evidence presented to the administrative tribunal (*Vavilov* at para 125). However, the decision must be based on an analysis that is inherently coherent, rational and justified in light of legal and factual constraints (*Vavilov* at para 85). The humanitarian and compassionate grounds for granting special relief must be proportionate to the significant breach of the Respondent's residency obligation (*Ouedraogo* at para 27; *Patel* at para 12). Here, none of the factors considered by the IAD, except for the factor of family ties, which can only be of slight weight in the circumstances, can be accepted as humanitarian and compassionate grounds. Taking into account the IAD record and adopting a holistic and contextual approach, I find that the reasons in this case do not allow me to understand the reasoning of the IAD, which, with due respect, contains contradictions and inconsistencies. The reasons provided do not justify the decision taken. The reasons for leaving Canada, the prolonged stay abroad and the lack of return at the earliest opportunity, the low degree of establishment, the speculative dislocation if a return to Canada is not granted and the absence of circumstances such that they would involve humanitarian and compassionate grounds other than

those listed in our law do not favour the Respondent. While the breach of the residency obligation is highly pronounced, the absence of humanitarian and compassionate grounds means that the IAD's decision cannot be reasonable in the sense of administrative law. The decision should therefore be set aside, and the matter is sent back to the IAD for reconsideration by a differently constituted panel.

[69] There is no serious question of general application that can be stated given the particular circumstances of this case.

JUDGMENT in IMM-4746-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is granted.
2. The decision is set aside, and the matter is returned to the IAD for reconsideration by a differently constituted panel.
3. There are no serious questions of general importance to be certified under section 74 of the Act.

"Yvan Roy"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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